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NEW JERSEY DEPARTMENT OF)	<u>ADMINISTRATIVE ACTION</u>
ENVIRONMENTAL PROTECTION,)	FINAL DECISION
NORTHERN BUREAU OF WATER)	
COMPLIANCE AND ENFORCEMENT,)	OAL DKT NO.: ECE 03730-15
)	AGENCY REF. NO.: PEA 130002-87741
Petitioner,)	
)	
v.)	
)	
ACADEMY AUTO RECYCLERS, INC.,)	
)	
Respondent.)	
)	

This Order addresses the appeal of an Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) issued on June 24, 2014, by the New Jersey Department of Environmental Protection (Department), Northern Bureau of Water Compliance and Enforcement (Bureau) regarding an automobile recycling facility located at 1 Park Place, Lodi Borough, Bergen County (facility) operated by Academy Auto Recyclers, Inc. (Academy Auto). The AONOCAPA alleged that Academy Auto failed to comply with its authorization, identified as NJG0137928, issued under the New Jersey Pollutant Discharge Elimination System (NJPDES) General Permit NJ0107671 for Scrap Metal Processing/Auto Recycling (Permit), the Water Pollution Control Act (WPCA), N.J.S.A. 58:10A-1 et seq., and the regulations promulgated

pursuant thereto. The Department assessed a penalty of \$70,000 for the violations and directed Academy Auto to immediately comply with the Permit.

Academy Auto timely requested a hearing and the case was transferred to the Office of Administrative Law (OAL) where the matter was initially assigned to Administrative Law Judge (ALJ) Joan Bedrin-Murray. When the parties were unable to settle the matter, the Department filed a motion for summary decision, which Academy Auto opposed. On February 12, 2018, following ALJ Bedrin-Murray's departure, the matter was re-assigned to ALJ Ellen S. Bass. The parties again attempted, unsuccessfully, to resolve the matter.

ALJ Bass issued an Initial Decision on March 20, 2018, granting the Department's motion. The ALJ found no disputed material fact as to Academy Auto's liability for the violations. Regarding the penalties imposed, the ALJ concluded that only \$35,000 was supported. The Department filed timely exceptions, to which Academy Auto filed a reply.

For the reasons set forth below, I ADOPT in part, MODIFY in part, and REJECT in part the Initial Decision.

FACTUAL AND PROCEDURAL BACKGROUND

I ADOPT the ALJ's recitation of the facts as amplified and modified below.

Academy Auto operates an automobile recycling facility, where it receives and dismantles vehicles to sell the parts and scrap metal. The facility is located directly on the western bank of the Saddle River. Since 2001, Academy Auto has been authorized to discharge stormwater from the facility pursuant to terms and conditions set forth in a New Jersey

Pollutant Discharge Elimination System (NJPDES) general permit. On March 9, 2005, the Department re-issued Academy Auto's authorization under NJPDES General Permit NJ0107671. The General Permit was effective February 1, 2005, with an expiration date of January 31, 2010. As provided by the terms of the authorization, the General Permit, and the NJPDES rules (see N.J.A.C. 7:14A-2.8 and 6.13(d)), the authorization issued to Academy Auto remained in effect until the Department renewed the General Permit, effective April 1, 2013.

The Permit required Academy Auto to implement best management practices (BMPs) to control stormwater discharge. Among other things, Academy Auto was required to ensure that fluids, including fuels, crankcase oil, radiator fluids, and transmission fluids, are drained in such a way that the fluids are not exposed to stormwater or the ground surface. Academy Auto was also required to place all used engine blocks, cores, transmission components, turnings, and other oily materials on a concrete pad which is large enough to contain and support the materials and graded so that all residual oil and any stormwater drains into an oil/water separator.

The Department conducted a series of inspections of the facility between 2009 and 2014. When the Department inspected the facility on June 12, 2009, the Department found numerous violations. As relevant here, the Department observed that the concrete pad at the entrance to the facility, where vehicles were received and drained of fluids, did not have proper drainage control to prevent exposure of fluids to stormwater or the ground surface. The Department also observed numerous piles of automobile parts and scrap, with oily residue, stored directly on the ground and observed engine blocks with attached transmissions,

containing oily residue, stored uncovered, i.e., stored in such a way that failed to prevent exposure of fluids to stormwater or the ground surface. Indeed, the Department observed oil sheens on puddles throughout the facility and near the scrap piles. The Department also observed engine blocks with attached transmissions piled directly on the pervious soil of the facility, i.e., engine blocks that were not stored on a concrete pad which drained to an oil/water separator.

By letter dated June 30, 2009, the Department sent Academy Auto a copy of its inspection report and a notice of violation and directed submission of a report detailing what remedial measures the facility would undertake. Academy Auto responded by two separate letters, each dated July 27, 2009. In its responses, Academy Auto acknowledged that vehicles were dismantled and fluids drained on a concrete pad that lacked an oil/water separator. Academy Auto stated that because of flooding, it had to design and install another concrete pad with the required oil/water separator. Academy Auto also explained that it attempts "to minimize where practical all fluid discharges to the ground" and to "remove all fluids from cars where practical when they are processed on the concrete pad." It attributed any oily sheens on site to stormwater runoff from the streets and other properties. Academy Auto further stated that an oil/water separator was installed for a new concrete pad that was almost finished, to which all source material would be moved. Academy Auto asked for more time to comply with the permit requirements.

On March 4, 2010, the Department inspected the facility again, and again observed discharges of automotive fluids throughout the property. The Department issued a field notice of violation for Academy Auto's continued non-compliance.

The Department conducted its next inspection on June 16, 2011, and observed many of the same violations seen two years prior. Among other violations, the Department observed that Academy Auto did not drain fluids in a way to prevent exposure of the fluids to stormwater or the ground surface. Vehicles were still being drained of fluids on the concrete pad at the entrance to the facility, which had no oil/water separator or berm to direct and capture discharges or runoff to prevent exposure to stormwater or ground surface. Moreover, oily auto parts and materials were still being stored on unpaved surfaces, which had heavy staining. Oily sheens were again observed near the scrap piles. Academy Auto also continued to store and stack engine blocks in piles, uncovered, directly on the soil. The oil/water separator on the new concrete pad was covered with scrap material, preventing proper drainage from the concrete pad.

In its July 29, 2011 letter responding to the inspection report, Academy Auto again stated that it was in the process of moving all source material to the newly constructed concrete pad. Academy Auto also stated the oil/water separator for the newly constructed concrete pad was installed and working. Academy Auto repeated its claim that it removes "all fluids from the cars where practical when they are processed on the concrete pad," and requested an extension to completely implement its stormwater pollution prevention plan.

The Department conducted follow-up inspections on June 19, 2013, and on May 29, 2014. During these inspections, the Department found numerous permit violations persisted, with automobile fluids exposed to stormwater and ground surface. The Department subsequently issued the AONOCAPA at issue here. The AONOCAPA alleged that Academy Auto violated two permit conditions as observed during the Department's June 12, 2009, and June 16, 2011, inspections. First, the AONOCAPA alleged that Academy Auto violated the requirement that fluids from vehicles and other scrap material be drained in a manner that prevents exposure of the fluids to stormwater or the ground surface. Second, the AONOCAPA alleged that Academy Auto failed to place all used engine blocks, cores, transmission components, turnings and oily materials on a concrete pad large enough to contain and support the material and which drained to an oil/water separator.

The Department determined the penalty amounts for the two violations arising out of the June 12, 2009, inspection in accordance with the penalty matrix at N.J.A.C. 7:14-8.5(e). The Department determined that both violations were of moderate seriousness, because the violations substantially deviate from the requirements of the WPCA. The Department also determined that the conduct was moderate, as the violations were unintentional but foreseeable. The Department thus assessed a penalty of \$15,000, which was the mid-point of the range for a violation of moderate seriousness/moderate conduct, for each violation. The combined penalty for the violations resulting from the June 12, 2009, inspection was \$30,000.

For the two subsequent violations arising out of the June 16, 2011, inspection, the Department again determined the penalty amounts in accordance with the penalty matrix at

N.J.A.C. 7:14-8.5(e) and determined that both violations were of moderate seriousness and moderate conduct. The Department determined that the penalty for each violation should be assessed at the top of the range, for a combined penalty of \$40,000. The total penalty assessed in the AONOCAPA was thus \$70,000.

The ALJ in her Initial Decision granted the Department's motion for summary decision as to liability. However, notwithstanding that the ALJ agreed that the Department properly assessed the seriousness as moderate and conduct as moderate, the ALJ reduced the penalty to \$35,000, based on her finding that the Department inappropriately "doubled" the penalty. The ALJ concluded that the requirement that fluids be drained in a manner that prevents exposure of the fluids to stormwater or the ground surface was a general requirement, which included the more specific requirement that engine blocks, etc., be stored on a sufficiently large concrete pad that drains into an oil/water separator. Because the ALJ found that latter violation was but an example of the former violation, the ALJ deemed the Department's assessment of separate penalties as arbitrary. The ALJ thus reduced the penalty to \$35,000, comprised of \$15,000 for the first violation, observed during the 2009 inspection, and \$20,000 for the second violation, observed during the 2011 inspection.

The Department filed timely exceptions to the ALJ's penalty reduction. The Department argued that "merger" of the two violations and penalties was inappropriate, as each permit condition reflected a separate requirement. Academy Auto filed a timely reply, generally objecting to the ALJ's liability findings but, if the liability findings are adopted, agreeing that the penalty reduction was proper.

DISCUSSION

A party is entitled to summary decision where the moving party shows that there is no genuine issue as to any material fact challenged and should prevail as a matter of law. N.J.A.C. 1:1-12.5; Contini v. Bd. of Educ., 286 N.J. Super. 106, 121 (App. Div. 1995). Like the standard for summary judgment under Rule 4:46-2, the standard on a motion for summary decision requires the court or agency head to determine whether the evidence, when viewed in the light most favorable to the non-moving party, is “sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.” Contini, supra, 286 N.J. Super. at 122 (quoting Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995)). Based on the applicable standard, I agree that the Department was entitled to summary decision on the violations alleged and the resulting penalties assessed in the AONOCAPA. In doing so, I find that the ALJ misunderstood the permit conditions and violations, which resulted in her determination that the Department incorrectly assessed separate penalties for the two violations. Accordingly, I REJECT and MODIFY those findings and conclusions as follows.

As explained above, Academy Auto has operated its facility pursuant to a NJPDES Permit that required Academy Auto to implement BMPs to control stormwater discharge. Two requirements are at issue here. The first required Academy Auto to drain fluids in such a way that the fluids are not exposed to stormwater or the ground surface. The second required proper storage of all used engine blocks, cores, transmission components, turnings, and other oily materials on a concrete pad, with proper grading and drainage to an oil/water separator.

Taking these in turn, first, the Permit required that fluids from vehicles and other scrap material must be drained in a manner that prevents exposure of the fluids, which include motor oils and other pollutants from motor vehicles, to stormwater or the ground surface. The Department established through its certifications and Academy Auto's admissions that, at the time of each inspection, vehicles were received and drained of fluids on a concrete pad that lacked proper drainage control, i.e., no berm, no grading, and no oil/water separator, and thus did not prevent exposure of such motor oils and vehicle pollutants to stormwater and the ground surface. Automobile parts and scrap material with oily residue were also stored directly on the ground, and this likewise did not prevent exposure of the motor vehicle oils and fluids to stormwater and the ground surface.

Second, the Permit required that all used engine blocks and other automobile materials with oily residue be stored on a sufficiently large concrete pad that is graded to allow stormwater runoff to drain to an oil/water separator. Again, the Department established that, at the time of each inspection, engine blocks with attached transmissions were piled directly on the pervious soil of the facility and not on a concrete pad as required. On this point, the Department similarly established, through Academy Auto's own admissions, that the required concrete pad with oil/water separator was still being constructed and installed during the relevant times.

In its opposition to the Department's motion, Academy Auto failed to show a genuine issue of material fact regarding the violations at issue. N.J.A.C. 1:1-12.5(b). Academy Auto, through the certification of Academy Auto's president, asserted only that automobiles are

“now” drained of all fluids on the second concrete pad, which by its admission was not in place and utilized until after the June 16, 2011 inspection. Similarly, the Certification of Kenneth Woodruff, a consultant retained by Academy Auto after the AONOCAPA was issued, provided no facts relevant to the issues here, as he was not involved with the facility or its operation prior to July 2014.

Additionally, Academy Auto’s claim that the oil sheens and petroleum at the facility were due to stormwater runoff from the roads and a neighboring commercial facility does not create a disputed fact material to the violations at issue in this case and thus does not warrant a hearing. Even assuming that its property is impacted by runoff from neighboring areas, it is a reasonable inference that the piles of auto scrap material stored directly on the ground were the source of the oily sheens and stained soil observed at or near those piles.

Based on the foregoing, I REJECT the ALJ’s penalty reduction and MODIFY the Initial Decision to affirm the \$70,000 total penalty assessed in the AONOCAPA. As explained above, the violations that resulted in the individual penalties were separate violations arising out of two different requirements of the Permit. That both requirements generally address the concern that automobile recycling be conducted in a manner to prevent exposure of fluids to stormwater and the ground surface does not detract from the importance of each requirement. Moreover, I disagree with the ALJ’s interpretation that by exercising its enforcement discretion to assess penalties for only two violations on two days, rather than assess the maximum penalties available, the Department did not deem such violations as separate. Accordingly, I REJECT these findings in the Initial Decision.

The Department assessed the penalty pursuant to N.J.S.A. 58:10A-10.d, which authorizes the Department to assess a civil administrative penalty of not more than \$50,000 per violation per day in accordance with uniform penalty rules, which are set forth at N.J.A.C. 7:14-8.5. The penalty amount was determined in accordance with the penalty matrix at N.J.A.C. 7:14-8.5(f), which takes into account the seriousness of the violation, N.J.A.C. 7:14-8.5(g), and the conduct of the violator, N.J.A.C. 7:14-8.5(h).

The Department determined that each of Academy Auto's permit violations constituted a moderately serious violation, which includes "any violation... which substantially deviates from the requirements of the [WPCA]... or any violation of any... permit now or hereafter issued pursuant thereto...." N.J.A.C. 7:14-8.5(g)2iv. As the ALJ found, the violations had the clear potential to harm the environment. Therefore, the Department's determination that each of Academy Auto's violations was moderate in seriousness was appropriate.

The Department also determined Academy Auto's conduct to be moderate. Such conduct includes any unintentional but foreseeable act or omission. N.J.A.C. 7:14-8.5(h)2. Again, as the ALJ found, Academy Auto clearly could have and should have foreseen that noncompliance with the permit had the potential to cause such harm. The record establishes that the Department put Academy Auto on notice and provided numerous opportunities from the time of the first inspection until the AONOCAPA was issued for Academy Auto to comply with its permit. Academy Auto failed to do so. Thus, I find the Department's determination of moderate conduct for both violations observed at both inspections to be appropriate.

N.J.A.C. 7:14-8.5(e) requires that the penalty be established at the midpoint of the appropriate penalty range at N.J.A.C. 7:14-8.5(f). For violations of moderate seriousness and moderate conduct, the midpoint is \$15,000. N.J.A.C. 7:14-8.5(i) sets forth the factors which the Department may consider, in its discretion, to decrease or increase the penalty from the midpoint. For the two violations arising from the June 12, 2009 inspection, the Department determined that application of the factors did not warrant moving from the midpoint. In making this determination, the Department explained that the violations were observed on June 12, 2009, and had not been corrected when the AONOCAPA was issued. Considering the deterrent effect of the penalty and the potential impacts on receiving waters, the Department appropriately exercised its discretion in assessing the two penalties at the \$15,000 midpoint of the penalty range.

For the subsequent two violations arising from the June 16, 2011, inspection, the Department increased the penalty to the maximum amount within the range because Academy Auto continued to be in noncompliance with the permit conditions, despite the first notice of violation issued in 2009. Academy Auto's history of noncompliance and failure to correct the violations, along with the deterrent effect of the penalty and the potential impacts on the receiving water, support the Department's determination. Therefore, I find that the Department appropriately exercised its discretion in assessing the two penalties for the subsequent violations at the maximum amount within the range, \$20,000.

CONCLUSION

For the reasons set forth therein and above, I conclude the ALJ properly granted summary decision in favor of the Department. I ADOPT the ALJ's Initial Decision affirming the Department's determination that Academy Auto violated its permit, the Water Pollution Control Act, and the Department's rules, as alleged in the AONOCAPA, with the modifications described above. I REJECT the ALJ's penalty reduction and MODIFY the Initial Decision to find that the Department appropriately exercised its discretion to assess two separate penalties for the violations. Academy Auto is hereby ORDERED to immediately comply with the conditions of its NJPDES permit in accordance with paragraph 14 of the AONOCAPA and pay the total penalty of \$70,000 in accordance with paragraph 21 of the AONOCAPA within 30 days from the date of this Final Decision.

IT IS SO ORDERED.

DATE:

5/4/18



Catherine R. McCabe, Acting Commissioner
New Jersey Department of
Environmental Protection

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
NORTHERN BUREAU OF WATER COMPLIANCE AND ENFORCEMENT

v.

ACADEMY AUTO RECYCLERS, INC.

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